No. 72.

Brf. of Brown & Henderson for P. E.

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IN THE SUPREME COURT OF THE UNITED STATES

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THE TELLURIDE POWER TRANSMISSION COMPANY, AND L. L. NUNN, PLAINTIFFS IN ERROR,

vs.

THE RIO GRANDE WESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF OF PLAINTIFFS IN ERROR.

S. A. BAILEY,
For Plaintiffs in Error.

ARTHUR BROWN,
H. P. HENDERSON,
Of Counsel.

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STATEMENT OF THE CASE.

This is an action brought under the Utah Laws relating to eminent domain (Sections 3841-3860, Compiled Laws, 1888; see Appendix No. 1) for the ostensible purpose of condemning for railway purposes a small strip of land lying along the bottom of the Provo river canyon, 200 feet by 4,550 feet, the same being unsurveyed land of the United States as described in the complaint and as shown on the plat inserted between pages 4 and 5 of the transcript of record.

After formal allegations of plaintiff's corporate capacity, compliance with the provivions of the act of Congress of 1875 relating to railroad rights-of-way in filing with the Secretary of the Interior proofs of organization, the making of a survey and map and the adoption of route, the com-

plaint alleges (page 2) "that the defendant W. W. Ferguson *had* or *claimed*, prior to plaintiff's survey, some possessory right by occupation of said land;" that (page 3) he "refuses to sell, alleging that he has contracted to sell to the other defendants;" that (page 4) the other defendants refuse to sell because "they want said land and propose to flow the same for power purposes," and that the "interest of defendant Holbrook, if any, is held by him as trustee for the defendants The Telluride Power Transmission Company and L. L. Nunn."

In due time and form the two defendants last named, as residents and citizens of Colorado, filed a petition for removal of the cause from the state court to the United States Circuit Court for the District of Utah (page 8). An order was made remanding the cause to the state court (page 625). Plaintiffs in error objected, and still object to the exercise of jurisdiction by the state court.

A jury was empaneled in the case, (page 60) and heard all the evidence, but was not permitted to pass on any vital question of fact in the case. Plaintiffs in error, and L. L. Nunn in particular, claimed that he had the right to flow the strip of land in controversy as a part of a reservoir site to be used in connection with a flume and ditch line and an electric power plant, (pages 16 and 303) which he located and claimed in a preliminary way in 1894, in the name of L. Holbrook, trustee, (pages 259 and 638) and which had been definitely fixed and located on the ground in the fall of 1895, after making careful surveys (page 264); that the purpose for which said premises were to be used by him was declared by the Utah laws to be for a public use, and that under the law the same was not subject to condemnation for railway purposes; that he had been at all times and was diligently engaged in effecting an appropriation of the waters of the Provo River for said purposes, having expended

$50,000 thereon prior to the time of beginning of this suit, and more than $200,000 prior to the time of the trial thereof (page 284). The contention of plaintiffs in error, both as to the law and the facts in the case, is expressed in the requests of counsel on their behalf for instructions, which follow this statement and which express the law applicable to the case, and by requests for findings of fact, which are supported by all the evidence in the case and uncontradicted, all of which requests were peremptorily refused by the trial judge.

Without authority in law, and contrary to the evidence the trial judge assumed to decide the whole case adversely to plaintiffs by finding that at no time "the defendants The Telluride Power Transmission Company and L. L. Nunn, or either of them, had any possession of the lands sought to be condemned, or by appropriation or otherwise any right to raise the waters of Provo river so as to flow the same, or any right to the said lands or the possession thereof as a part of a reservoir site." (Page 49.)

On appeal to the Supreme Court of Utah the judgment of the lower court was affirmed. The court held that it had no authority to review the decision of the lower court in denying the petition for removal, apparently confusing its position with that of the Supreme Court of the United States in cases of appeal to it from rulings of questions of removal before final judgment in the inferior federal tribunals. The court held further that the appellant corporation had no power to acquire any rights in Utah for the reason that it had not complied with the laws of Utah relating to foreign corporations, and that even if priority of possession were shown under the Act of Congress (Sec. 2339 Revised Statutes U. S.) relating to water rights on the public domain, still the right of appellant corporation "to locate and use the water or land is not recognized by the laws of

this State, and it was not in position to question the right of the plaintiff in the premises." The court held further that appellant Nunn could not be treated as a personal claimant, for the reason that whatever was done by him in the appropriation of water was done for the use and benefit of the defendant company; that he had no title or possession and was not entitled to damages. Thus have the property and rights of the plaintiffs in error been taken from them with due process of law and the equal protection of the law has been denied to them. (Pages 664 to 672 inclusive.)

On the trial before the jury, the plaintiffs in error requested the court to instruct the jury as follows, all of which requests were refused (pages 43 to 47 inclusive):

I.

This action is brought under the Statute of Utah providing for and regulating the exercise of the right of eminent domain.

II.

The plaintiff can only maintain the action under this Statute, against parties who are the owners of the property in question.

III.

The right to condemn, or to maintain an action under this Statute, is based upon the idea that the defendants own the property and will not sell it for a necessary public use, and the gist of the action is to compel them to do so.

IV.

The plaintiff cannot maintain an action to condemn when it claims to own the title.

Colo. Mid. R. R. Co. v. Croman, 27 Pac. 256.

V.

The plaintiff cannot combine an action to quiet title with an action under this Statute.

27 Pac., 256.

VI.

If the complaint in this case alleges ownership in the plaintiff, the action cannot be maintained, and your verdict should be for the defendant.

VII.

If the plaintiff is permitted to maintain this action, it is estopped from denying that defendants Nunn and The Telluride Power Transmission Company, are the owners of the premises described in the complaint, the other defendants having disclaimed. The allegation, "that the defendants are the only persons and parties in possession of said land, or any part thereof, or claiming any right or title therein or thereto," is an allegation that they are the owners, and plaintiff cannot be heard to deny its own allegations.

VIII.

The use to which it is alleged the defendants propose to put said land, namely, "to flow the same for power purposes," is a lawful, public use under the Statutes.

IX.

The purchase of the interest of Ferguson, an occupant of unsurveyed land, must be construed as a relinquishment of all claims to the land and all damages thereto occasioned by flowing the same for power purposes.

X.

So far as this case is concerned, the right to appropriate water begins when actual work begins, which is intended

and calculated to effect an application of the water to some beneficial use, and the right continues as long as the work is prosecuted with diligence. While the work is being so prosecuted the extent of the right is the same as the extent of the claim made by the appropriator within reasonable limits. The appropriation should be completed within a reasonable time; and when it is so completed the right relates back to the beginning of the work and is limited by the extent of the appropriation. What are diligence, a reasonable time, and reasonable limits, are questions of fact for the jury under all of the circumstances of the case.

XI.

If defendant Nunn at any time prior to March 24th, 1896, determined to appropriate the waters of Provo river for power purposes, and to build a dam for the purpose of obtaining such power, and commenced work in the Provo canyon, and such work plainly indicated such purpose on his part, and was calculated to carry out such purpose, and he was at all times up to the commencement of this suit prosecuting said work with diligence, and if such dam and the power to be generated thereby were reasonable in their extent and purpose, and the erection of such dam would flow the land described, and the plaintiff had knowledge of this fact on March 24th, 1896, and said plaintiff had not before that date commenced to survey its proposed line of road running over said land, then your verdict should be for the defendant.

XII.

If defendant, Nunn, had before March 24th, 1896, formed the purpose in good faith to build a dam in Provo river at or near Hanging Rock to a height of 25 feet, thereby raising the water to that extent and overflowing the land

described, and had after such determination commenced actual operation on the ground, fairly and reasonably indicating such purpose, and continued the same with diligence to the commencement of this suit, and the plaintiff before it commenced its work knew of such purpose then and in that case your verdict must be for the defendant.

XIII.

If, under the rule before stated, defendant Nunn acquired the right to flood the strip of land described for power purposes, and said right was prior in point of time to the right of plaintiff, and if the plaintiff could build its line of road on a grade carrying it above the obstruction in the river and the land overflowed thereby, then and in that case plaintiff is not entitled to condemn the land in controversy.

XIV.

In order to estop defendants from asserting as against plaintiff the right to flow the premises in question it must appear that defendants represented to the plaintiff by word or act that they made no such claim, and that plaintiff has acted upon such representation.

XV.

The jury are instructed that in considering the question of necessity and the right to use and appropriate the unappropriated forces and opportunities provided by the water courses and passes through the mountains and in the canyons of this State, regard must be had to the necessities of the various enterprises and the rights of other industries having occasion to use the same; and if a first appropriator has confined himself within those limits, a person or party seeking to avail himself of a second right of appropriation must if possible, exercise his right without destroying or impairing the rights of the first appropriator.

XVI.

The question as to which party made the first appropriation of the land described, is a question of fact for the jury.

XVII.

The question of necessity is a question of fact for the jury.

XVIII.

The evidence in this case shows conclusively that the line of railroad adopted and approved by plaintiff prior to the commencement of this suit, does not include any part of the land in controversy, and there is no evidence tending to show that the plaintiff had adopted or approved a definite line of location over the land described, and therefore your verdict should be for the defendants.

XIX.

Before the railroad company can acquire any rights under the act of Congress of 1875, as against one in possession of the land in question, it must show a strict compliance with all the terms of the act.

XX.

If the jury finds that plaintiff did not begin the construction of a line of railway through Provo Canyon within ten years from the filing of its original articles of association, its right to build such line has ceased by operation of law.

XXI.

Under the undisputed evidence in this case your verdict should be for the defendants.

XXII.

If the jury reach the question of assessing the damages I charge you that so far as defendants Holbrook and Ferguson, are concerned, no damages should be awarded as to them, they having disclaimed.

XXIII.

In assessing the damages of defendants Nunn and The Telluride Power Transmission Company the jury should consider the right which defendants have to use said premises, and the use for which they intended to appropriate them, and should assess in their favor the value of that use to them.

XXIV.

In assessing value upon condemnation proceedings, such damages should be given as will compensate the defendants for the value of the premises for the use to which they intended to put them, and for the loss of any right which they are precluded from exercising by reason of such condemnation.

XXV.

In determining the value of the premises and the amount to be assessed in favor of defendants, the use to which defendants intended to apply the same, and to which said premises are adapted, should be the basis of the valuation; and if said premises are adapted to a particular use, and defendants acquired them for such use, the value placed upon them should not be limited to any other use.

XXVI.

An appropriator of water may change the point of diversion as well as the point of application whenever neces-

sary, subject only to the limitation that such change does not injuriously affect the rights of others.

XXVII.

In estimating the damages the jury should estimate and assess the same by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the near future.

XXVIII.

Where the property has been acquired and improved for carrying on a special business, and such business in fact enhances the value of the site, this fact may be considered in estimating the damages, and the damages are not confined to the purpose to which the land is being devoted. The jury may consider any purpose for which the land is adapted, and which enters into and effects its market value.

And afterwards when the court made its findings of fact the plaintiffs in error requested the court to make the following findings, all of which were refused, (pages 600 to 602):—

The defendants again protesting against this Court finding the facts herein, and not waiving their objection to the Court's assuming to find the facts and refusing to submit the questions of fact to the jury, hereby request the Court to make the following findings of fact, in case the facts are found by the Court:

1. That in the year 1895, L. L. Nunn, who was and is a citizen of the United States, located a reservoir and dam site in the Provo canyon, at or near a point known as Hanging Rock, on Provo river, and located and surveyed a flume or ditch line therefrom at a height of 60 feet above the

water level at said point, and staked and marked the same plainly upon the ground, and claimed the right to convey the waters of said river along said line to a point near the mouth of said canyon and to utilize the same for purposes of generating power and other beneficial uses; and at the same time located and plainly marked upon the ground a site for a small or temporary dam and flume some distance below Hanging Rock, with which to aid in the construction of the upper or large dam and water-way, and that in the fall of 1895 he commenced the execution of said work with a large force of men.

2. That prior to the commencement of this suit he had expended on said work about $50,000, and $150,000 since then, and that said work has been prosecuted with diligence at all times.

3. That it was the intention of said Nunn to construct a plant capable of generating 10,000 horse power by means of said large dam and flume, and that it is possible to do so; that the cost of constructing same would be greatly lessened and the time of its completion hastened by the use of power generated by said smaller and temporary plant.

4. That the proposed appropriation of the waters of said river is reasonable to the extent of 10,000 horse power, and that the work done by said Nunn is reasonably calculated to affect said appropriation.

5. That the land which would be covered by the proposed reservoir, as located and surveyed by said Nunn, except 160 acres in which the strip of land in controversy is included, was and is unoccupied and unsurveyed land of the United States.

6. That long prior to 1895, one W. W. Ferguson, who is named as a defendant, settled upon said 160 acres, situated above Hanging Rock on the Provo River, and was residing and living thereon during 1895.

7. That defendant, Nunn, in pursuance of a verbal agreement, made in the fall of 1895, entered into a written contract with said Ferguson on April 24th, 1896, for the purchase of said 160 acres, who afterward, in pursuance of said contract conveyed said lands to defendant, Nunn, by good and sufficient deed.

8. That on March 24th, 1896, and for some time prior thereto, defendant Nunn, had said dam and reservoir sites, and the lines of said flumes, plainly marked upon the ground and his employees were in possession thereof prosecuting said work.

9. That plaintiff, through its general manager, had actual notice in the fall of 1895, that defendant was engaged in the construction of a power plant in said Provo Canyon, and was intending to erect a dam, which plaintiff admits was to be of a height not exceeding 25 feet.

10. That on March 24, 1896, plaintiff with a force of one surveyor and three other employees, began a survey of an alleged line of railroad up said Provo canyon and along said river. That about April 10, 1896, said surveyor reached a point near Hanging Rock with an angle line; that he found employees of defendant Nunn there engaged in preparation for the building of said dam, and was informed by them that the water would be taken near that point by means of a dam on a level of 60 feet above the river; that on about May 13, 1896, said surveyor had reached said point with a final location line on the north side of said river, and was then informed by employees of defendant Nunn that the proposed dam would be 85 feet high, and the site thereof was plainly marked upon the ground.

11. That a map of said surveyed line of railroad was filed in the local land office in June, 1896, and adopted on June 9, 1896, by resolution of the Board of Directors of

plaintiff. That said line as surveyed and adopted is on the north side of the river across said 160 acres.

12. That about July 1, 1896, a large portion of plaintiff's line was changed from the north to the south side of the river, a distance of 200 feet or more, and that a plat of said line as changed was filed in the land office in December, 1896, after the commencement of this suit, and that said survey extends through the strip of land in controversy. That no part of the land in controversy is included within the strip of land 200 feet wide along the line adopted by resolution of June 9, 1896.

13 That the line as surveyed through the premises in controversy had not been adopted by the plaintiff at the time of commencement of this suit.

14. That the center line of railroad as surveyed by plaintiff runs along the bottom of said canyon, and at the place where defendant has erected his temporary plant and along the land in controversy it would be when graded only about 14 feet above the surface of the river.

15. That a part of the premises in controversy is flooded by the present temporary dam of defendant, which is 10 feet high; that a dam 25 feet high at or near Hanging Rock would flood the proposed grade of the entire center line through the premises in controversy to a depth of from 10 to 12 feet and the greater portion of said premises.

16. That the average grade of said line of railroad through said canyon is less than one per cent, and the maximum grade established by plaintiff, is two per cent. That for a considerable distance above Hanging Rock, which is about 1,200 feet below the Ferguson land, the grade is about one-tenth of one per cent, and for more than half a mile before said point, it averages less than one per cent.

17. That a line could be surveyed and a road built for very little, if any, additional expense, so as to overcome

with a grade less than two per cent, a dam 25 feet high, at Hanging Rock.

18. That on the trial of this cause, defendants offered, in open court, to give to plaintiff a right of way through the entire reservoir site, including a right of way over said 160 acres, for a line of road, which would permit the erection of a dam 25 feet high at Hanging Rock.

19. That a storage reservoir is essential to the enterprise of defendants to an extent of at least 25 feet, for the purpose of protection from ice and of regulating and equalizing the flow of water.

20. That there is no necessity for condemning a right of way for a railroad on the line as surveyed over the premises in controversy.

21. That there is no necessity for condemning a right of way for a railroad on a line which would not permit the erection and maintenance of a 25-foot dam at Hanging Rock.

22. A railroad can be built along the hillside above the bed of the stream, through said canyon; a reservoir must occupy the bed of the stream.

23. The necessity of defendants' use of the premises in controversy, for their purpose, is greater than the necessity of plaintiff, for its purpose. Both are *quasi public* uses, and other things being equal, they stand upon an equal footing.

24. The occupation of the premises in controversy, by defendant, Nunn, for a public use, was prior to the survey of plaintiff's line over the same.

25. The value of the premises in controversy, involving the privilege to flood them with a dam 25 feet high at Hanging Rock, is $100,000, and vastly more, if the privilege of flooding them with an 85-foot dam is involved.

26. The storage and appropriation of the waters of

said river by means of a dam 25 feet high, at or near Hanging Rock, is a reasonable appropriation.

SPECIFICATION OF ERRORS.

Plaintiffs in Error assign the following errors (Trans. pages 674-675-676):

1. The court erred in denying defendants' petition to remove said cause to the Federal Court.

2. The court erred in assuming to retain jurisdiction over said cause and proceeding to try the same after the filing of the petition on the part of the defendants to remove said cause to the Circuit Court of the United States for the District of Utah.

3. The court erred in holding and deciding that it had jurisdiction to hear, try and determine said cause.

4. The supreme court of the State of Utah erred in sustaining the decision of the district court in refusing to remove said cause and in holding that it, the supreme court, had no jurisdiction to review that decision.

5. The district court erred in refusing to charge the jury as requested in request No. 8 as follows, to-wit:

"The use to which it is alleged the defendants propose to put said land, namely, 'to flow the same for power purposes,' is a lawful, public use under the Statutes."

And the supreme court erred in sustaining the district court in that ruling.

6. The district court erred in refusing to charge the jury as requested in request No. 10 as follows, to-wit:

"So far as this case is concerned, the right to appropriate water begins when actual work begins, which is intended and calculated to effect an application of the water to some beneficial use, and the right continues as long as the work is prosecuted with diligence. While the work is being so

prosecuted the extent of the right is the same as the extent of the claim of the appropriator within reasonable limits. The appropriation should be completed within a reasonable time; and when it is so completed the right relates back to the beginning of the work and is limited by the extent of the appropriation. What are diligence, a reasonable time, and reasonable limits, are questions of fact for the jury under all of the circumstances of the case."

And the supreme court erred in sustaining the district court in that ruling.

7. The district court erred in refusing to charge the jury as requested in request No. 11 as follows, to-wit:

"If defendant Nunn at any time prior to March 24th, 1896, determined to appropriate the waters of Provo river for power purposes, and to build a dam for the purpose of obtaining such power, and commenced work in Provo canyon, and such work plainly indicated such purpose on his part, and was calculated to carry out such purpose, and he was at all times up to the commencement of this suit prosecuting said work with diligence, and if such dam and the power to be generated thereby were reasonable in their extent and purpose, and the erection of such dam would flow the land described, and the plaintiff had knowledge of this fact on March 24th, 1896, and said plaintiff had not before that date commenced to survey its proposed line of road running over said land, then your verdict should be for the defendant."

And the supreme court erred in sustaining the district court in that ruling.

8 The district court erred in refusing to charge the jury as requested in request No. 12 as follows, to-wit:

"If defendant, Nunn, had before March 24th, 1896, formed the purpose in good faith to build a dam in Provo

river at or near Hanging Rock to a height of 25 feet, thereby raising the water to that extent and overflowing the land described, and had after such determination commenced actual operation on the ground, fairly and reasonably indicating such purpose, and continued the same with diligence to the commencement of this suit, and the plaintiff before it commenced its work knew of such purpose then and in that case your verdict must be for the defendant."

And the supreme court erred in sustaining the district court in that ruling.

9. The district court erred in refusing to charge the jury as requested in request No. 13 as follows, to-wit:

"If, under the rule before stated, defendant Nunn acquired the right to flood the strip of land described for power purposes, and said right was prior in point of time to the right of plaintiff, and if the plaintiff could build its line of road on a grade carrying it above the obstruction in the river and the land overflowed thereby, then and in that case plaintiff is not entitled to condemn the land in controversy."

And the supreme court erred in sustaining the district court in that ruling.

10. The court below erred in charging the jury:

"As a guide on the question of compensation and damages you are instructed that it is admitted that the tract of land of which the strip in question is a part, was and is unsurveyed public lands of the United States. That the occupant of such land acquires no title or estate in the land by such occupation or possession."

And the supreme court erred in sustaining the court below in that charge and in refusing to reverse the case by reason thereof.

11. The court below erred in charging the jury as requested by the plaintiff in request No. 6:

"In assessing values and damages, you are to consider

the condition of the land and improvements pertaining to the realty, as they existed on the said 14th of September, '06, and with reference to their fair market value for the uses to which they could be put as lands in their condition, and you are instructed that neither of the defendants, L. L. Nunn or The Telluride Power Transmission Company has shown a right to flow the same, or to their use as a reservoir site, or to any increase of value or damages by reason of any right to flow or use the same as a reservoir site; but you are further instructed that under the issues submitted to you for your determination in this case, you cannot in estimating the market value of the premises, or the damages to the possessory right of the defendants thereto, consider such value with reference to any right of the defendants or either of them, to flow the same with water to any depth whatever."

And the supreme court erred in sustaining the court below in that charge and in refusing to reverse the case by reason thereof.

12. The supreme court erred in holding that the defendant corporation The Telluride Power Transmission Company had no right to acquire title or right of possession to the land involved for the purpose of a reservoir because it was a corporation of the State of Colorado.

13. The supreme court erred in holding that the appellant corporation had no right to acquire lands because it did not comply with the laws of the State of Utah and had no power to acquire water rights under the laws of the United States.

14. The supreme court erred in holding that the appellant corporation "unlawfully assumed to appropriate land and water within the State of Utah."

15. The supreme court erred in holding that any law or the constitution of the State of Utah would be valid

which excluded or attempted to exclude the appellant corporation created under the laws of Colorado from acquiring lands of the United States and water rights situated in Utah or from acquiring title to the lands of the United States situated within the limits of Utah.

16. The supreme court erred in holding that the appellant Nunn a resident of Colorado had no authority to acquire in his own name by location under the laws of the United States water rights which were subsequently to be used for the purpose of the appellant corporation.

17. The supreme court erred in holding that because the appellant corporation organized under the laws of the State of Colorado did not appoint an agent in Utah that therefore it, the appellant corporation, had no authority to locate unsurveyed lands of the United States in the State of Utah for the purposes of a reservoir and to acquire title to said land and to water right under the laws of the United States.

BRIEF OF THE ARGUMENT.

I.

Removal.

The right to have the case removed to the federal court is plain. The facts warranting removal appear on the face of the complaint (pages 1 to 4), except the requisite diversity of citizenship and the value in controversy, which are alleged in the petition (pages 8 and 9.)

The complaint does not allege that defendant Ferguson has any present interest in the premises sought to be condemned, but a past interest, to-wit, that he "had or claimed, prior to plaintiff's survey, some possessory right," and that he refused to sell on the ground that he had contracted to sell to the other defendants. Mr. Holbrook is alleged in

the complaint to be trustee for the other defendants, the plaintiffs in error.

Making these parties, Holbrook and Ferguson, defendants should not defeat a removal.

Dillon's Removal of Causes, 2nd Ed. Sec. 17.
Black's Dillon on Removal of Causes, Sec. 148.
Bates vs. Carpentier, 98 Fed. Rep. 452.
Stanbrough vs. Cook, 38 Fed. Rep 369.
Bacon vs. Felt, 38 Fed. Rep. 870.
Union Pacific Ry. Co. vs. City of Kansas, 115 U. S. 22.

On the face of the complaint, therefore, it appears that the defendants, The Telluride Power Transmission Company and L. L. Nunn, are the only defendants actually interested, and that the only controversy in the case is between them and the plaintiff.

Granting, however, that both Ferguson and Holbrook are proper and necessary parties under the procedure prescribed by the Utah statutes relating to eminent domain,—granting further that Ferguson has a possessory right capable of conveyance,—there would still remain a controversy wholly between the plaintiff and the other defendants, namely, with reference to the extent of the latter's appropriation of the premises as a part of a reservoir site. This water right is a separate right from the right to the land itself, and is so recognized by the act of Congress referred to (Sec. 2339, R. S. U. S.) and by the laws of Utah as well as of other western states. Under the laws of Utah this right is declared to be a public use, (Laws of Utah, 1892, page 92; Laws of Utah, 1896, page 316; See appendix No. 2), in behalf of which the right of eminent domain may be exercised. And if Ferguson had made no agreement with either party and both were seeking to use the premises by condemnation

proceedings, one as a part of a reservoir site, and the other for railroad purposes, there would still be a separate and distinct controversy between them, in which the prior appropriator would have the superior right. Even if the first acts of appropriation on the part of both were made simultaneously, and suits for condemnation against a third party instituted at the same time,—a rare yet possible occurrence,—provision is made by the statutes of Utah for settling that question (Sec. 3850, 3rd clause, C. L. 1888), and the just rule would seem to be that the use which seemed to be of the greater public benefit should prevail, unless an arrangement could be made by which both uses might co-exist and the public be deprived of neither. So that in any point of view there is a separate and distinct controversy wholly between the plaintiffs and the defendants, The Telluride Power and Trasmission Company and L. L. Nunn.

In the case of Bellaire vs. Railroad Co., 146 U. S. 117, cited by the federal judge as an authority for remanding the case, the facts are so entirely different as to distinguish it from this case. The complaint alleged that the Baltimore & Ohio R. R. Co., a Maryland corporation, and the Central Ohio R. R. Co., an Ohio corporation, "claimed to be the owners, legal and equitable" of a strip of ground 60 feet by 160 feet which the City of Bellaire sought to condemn for the purpose of opening and extending a street, but that "as to the proportionate interest of each of said defendants, plaintiff is not advised." In its petition to transfer the cause, the Baltimore & Ohio R. R. Co set forth that it was in possession under a lease from its co-defendant. No question seems to have been raised as to the propriety of setting forth this fact in the petition; but granting it to be a fact and properly in the record, the court held the controversy to be "not the less a single and entire one, because the two defendants owned distinct interests in the land, and

might be entitled to separate awards of damages." In that case both defendants were beneficially interested in the premises sought to be condemned, and in their use for railway purposes, and the right of the city to condemn. In the present case the only defendants beneficially interested, according to the complaint itself, are the defendants who filed the petition, the plaintiffs in error. And the complaint itself presents a controversy solely between the plaintiff and the petitioners, namely what claim the petitioners have to flow the premises for power purposes, and whether under the laws of Utah relating to eminent domain the plaintiff has any right to have the premises condemned for railroad purposes when they are already dedicated to another public use of equal importance.

As was said in Bybee vs. Hawkett, 6 Sawy. 593, at 601: "The clause, 'a controversy which can be fully determined as between them,' read in connection with the words 'actually interested in such controversy' implies that there may be other parties to the suit, and even necessary parties, who are not entitled to removal." The action "is framed for the purpose of including in one suit as many separable controversies as the defendants may be able to assert." It is indeed difficult to imagine a case with several defendants that is more adapted to the statutory requirements for removal than that presented by the complaint in this case.

II.

The real nature and purpose of the action. Property of plaintiffs in error taken without due process of law.

The real nature and purpose of the action may be best understood by a brief reference to the natural, physical

features and surroundings, as shown by the testimony of both parties.

Between the Heber Valley, in Wasatch County, and the Utah Valley, in Utah County, the Provo river flows for a distance of about ten miles through a narrow canyon. The upper half of the canyon is comparatively level, having a fall of but little more than one-tenth of one per cent (pages 206 and 262). No part of it was occupied by settlers except the quarter section which has been claimed by defendant Ferguson (page 286). In the lower half the river has a fall of nearly two per cent, or about 400 feet in a distance of four and a half miles. Near the lower end of the level portion there is a narrow place in the canyon, hemmed in by two natural abutments, directly opposite each other, about 85 feet high and 300 feet apart, called the abutments or Hanging Rock, the location of defendants' dam site. From this point, on the north side of the river, a series of benches, commencing at an elevation of sixty feet above the river, extend in almost level and unbroken line to the mouth of the canyon (262). With a fall of 400 feet and 15,000 cubic feet of water per minute—which is less than the average flow—10,000 horse power may be generated. Or, to express the matter with mathematical accuracy: Since one horse power will lift 33,000 pounds one foot in one minute, and water weighs 62 pounds per cubic foot, 15,000 multiplied by 62 multiplied by 400 equals 372,000,000, which product divided by 33,000 gives 11,275 as the theoretical horse-power. The storage of a large volume of water, such as a dam 25 feet higher than the level of the flume might afford, would give assurance—it is the only thing that can give assurance—of an equal flow of water, night and day, in low and high season, which the necessities of such a plant as defendants were engaged in constructing demand, and consequently of a large increase in the available and salable power. Within

a radius of forty miles from the mouth of the canyon are Salt Lake City and the flourishing mining camps of Park City, Bingham, Mercur, and Tintic, and other populous towns, affording a large and increasing market for electric light and power. (Page 284.)

Mr. Nunn was manager of a successful power-transmission plant in Colorado, a pioneer in the field. For himself and associates he desired to find a water-power which would develop 10,000 horse-power. In the fall of 1894 he visited Provo Canyon in company with Mr. Holbrook, who was then Mayor of Provo (page 259). Although Mr. Nunn was disappointed in the size of the river and the fall, he decided to make more thorough investigation, with a view to increasing the available power by reservoirs. Mr. Holbrook was instructed to post a notice in the canyon near the head of the greatest fall, claiming the right to appropriate the the water by means of a suitable dam and flume, for power and other beneficial purposes. Such a notice was posted near the wagon bridge, which is some distance below Hanging Rock, but which, as the testimony of both parties shows, is near the summit of the canyon. The work of the following year was devoted mainly to making careful surveys and clearing the ground of brush. It must be remembered that at an elevation of a mile above sea level, the winters in the canyon are long, and the working season, especially for such preliminary work as surveying, is very short. In the fall of 1895 the general scope and character of the enterprise were determined. The 60 feet of Suhr level, along the line of benches on the north side of the river, was adopted as the main course. To divert the waters of the river on that level it was necessary to build a dam of sufficient height near the summit of the canyon, and Hanging Rock was selected and marked out as the place for the dam. For the purpose of storing, equalizing

and regulating the flow of the water it was decided to build a dam 25 feet higher than the level of the flume (page 266). The construction of such a dam would necessarily involve the moving of an enormous mass of material, which would obviously be greatly facilitated and hastened by the use of power. To furnish this power, a smaller, temporary plant was, therefore, begun first (page 267).

In the fall of 1895, according to the testimony of the general manager of the railroad company himself, he first heard that "Mr. Nunn contemplated building a dam in this river to make water power" (page 614). As early as possible in the spring of the following year, railroad surveyors were set to work surveying a line up the canyon and through the reservoir-site, with instructions to hasten the work, and have a map ready for filing on the first twenty miles as soon as possible (page 616). Under instructions from the general manager grading was commenced as soon as the line was run, first on the north side of the river just above the proposed dam, on a line which had been platted and adopted, and afterward on the south side of the river on a line which was not platted until December, 1896, three months after the suit was filed, and which is the line described in the complaint and shown on the map filed (page 132). This grading was done under the direction of the railroad attorney, and its avowed purpose was to bring on a controversy with Nunn and the power company (page 620).

The real purpose of the action is, therefore, not merely to condemn the small, comparatively valueless strip of ground described in the complaint, but to prevent the defendants from carrying out their enterprise, and to destroy the entire reservoir-site of which said strip is a very small part. In an action to condemn that small strip of ground, instead of being held to have admitted the defendant's title, the plaintiff was not only permitted to deny the defen-

dant's title, but to take it away by virtue of a mere instruction of a trial judge, who assumed the authority contrary to law and in violent contradiction to all the evidence in the case.

If the second clause of Section 3850 (C. L. Utah, 1888) may be interpreted as the trial judge was made to interpret it, that in an action of this nature he is to decide the rights of the parties without a jury, regarding the claims of the plaintiff and those of the defendants as adverse or conflicting claims within the meaning of the statute, then the statute is clearly void under the 14th amendment to the United States Constitution. We take the meaning of the statute to be that in case an action is brought to condemn the property to which several persons are at the time making claims adverse and conflicting among themselves, then the court may without a jury determine those claims for the purpose of that action, just as the third clause of said action provides for the case of several plaintiffs who are seeking at the same time to condemn the same property. In the nature of things such cases would rarely arise, and for that reason there is little or no judicial interpretation of these provisions of the statute. If Mr. Nunn had not bought Ferguson's interest, a case under the third clause, of two plaintiffs seeking condemnation of the same property, might have arisen out of the present controversy. But among the defendants in this case there are no adverse or conflicting claims. Yet the court proceeded to construe all claims made by the defendants as conflicting or adverse claims as against the plaintiff, and summarily to decide, without the assistance of the jury which was impanelled on the first day of the trial and heard all the evidence, that the defendants had no rights at all. This was a plain misconstruction of the law, an unwarranted assumption of authority by the trial judge, and a monstrous injustice to the defendants.

If under the Utah statutes relating to eminent domain the plaintiff may deny the defendant's title, and does deny it, then the action is really an action in ejectment, and under Section 3350 C. L. of Utah, 1888 (Appendix No. 3), the defendant is entitled to have all questions of fact tried by a jury. On such a proposition surely no argument is needed. The record shows that in this case the defendants demanded a jury, and that the case was tried before a jury. All questions of fact, therefore, should as a matter of right have been submitted to the jury; yet the court even refused to submit the various questions of fact to the jury for an advisory verdict upon defendants' request, as it refused every other request of the defendants. And thus the defendants were deprived of their property without due process of law, and the equal protection of the laws was denied to them.

The law relating to the acquisition of water rights is expressed in the request of defendants, refused by the trial judge, as follows:

> "So far as this case is concerned, the right to appropropriate water begins when actual work begins, which is intended and calculated to effect an application of the water to some beneficial use, and the right continues as long as the work is prosecuted with diligence. While the work is being prosecuted, the extent of the right is the same as the extent of the claim made by the appropriator within reasonable limits. The appropriation should be completed within a reasonable time; and when it is so completed the right relates back to the beginning of the work and is limited by the extent of the appropriation. What are diligence, a reasonable time, and reasonable limits, are questions of fact for the jury under all the circumstances of the case."

Black's Pomeroy on Water Rights, Sections 53, 55.

Ophir Silver Mining Co. vs. Carpenter, 4 Nev. 534.

Orwin vs. Strait, 18 Nev. 436.

Osgood vs. El Dorado Water and Deep Gravel Co., 56 Cal. 571.

Water-Supply & Storage Co. vs. Larimer & Weld Irrigation Co., 51 Pac. Rep. 496. (Colo.)

The instructions requested with particular reference to the facts in the case should have been granted, but were refused, to the great prejudice of the defendants.

Under the laws of Utah prior to 1897, (Laws of 1897, page 221) there was no provision for any particular kind of notice by an appropriator of water to protect him in the interim between the beginning and the completion of his work. Whatever notice was required was actual notice, or such as would put a prudent man upon inquiry. That the plaintiff had actual notice of defendant Nunn's work in Provo Canyon and of the scope and purpose of his claims is a fact that shines through the whole record. The railroad survey was begun in March, 1896, and the plaintiff's general manager testifies that he had notice "in the fall of 1895 that Mr. Nunn contemplated building a dam in this river to make water power." (Page 614.) The letters and telegrams of the plaintiff's general manager with reference to the railroad survey and grading in the canyon (pages 615-622) show that the one purpose of the railway company was to bring on as soon as possible a contest with Mr. Nunn and the Power Company.

The plaintiff now contends that defendants are estopped by judgment in the case of The R. G. W. Ry. Co. vs. The T. P. T. Co., *et al.*, the record in which case was introduced in this case "for any purpose it is useful for." this case.

The cause of action, the parties and the subject matter in the two cases are different. A careful consideration of the testimony in this case will show that the findings in that

case are as biased and untrue as are the findings made in The main point decided by the Supreme Court of Utah in that case—if not, indeed, the only point decided—is that the consolidation of two railroad companies under the laws of Utah creates a new corporation, and that the statutory term given it within which to finish its road and put it in operation is ten years from the time of filing its articles, and not the unexpired term of the constituent companies, 16 Utah, 125, at 135. To what extent the inchoate rights of the defendants should be protected—which is the very gist of this case—was not passed upon or in any way adjudicated in that case. *The right to perfect their rights*,—a right which is held out and guaranteed by both local and federal laws to every appropriator of water in the arid regions of our country, and without which no industry dependent upon water rights, whether agricultural, mining or manufacturing, could be developed,—has been denied to the defendants.

Equal Protection of the Laws Denied Plaintiffs in Error.

The Supreme Court of Utah held that the plaintiff in error, The Telluride Power Transmission Company, being a corporation organized in Colorado, and not having complied with the laws of Utah relating to foreign corporations in filing its articles and appointing an agent in the latter state, was not entitled to the benefits of the laws of Utah, was incapable of acquiring ownership of land or water rights on the public domain in Utah, and that "it was not in a position to question the right of the plaintiff in the premises." The constitution of Utah does indeed provide that no foreign corporation shall do any business in Utah without filing its articles and appointing an agent in that state, and a statute provided that any foreign corporation failing to do so shall not be entitled to plead the statutes of limita-

tions in any action brought against it. (Constitution of Utah, Article XII, Sections 6 and 9; Compiled Laws of Utah, 1888, Section 2293. See Appendix No. 4.) That such a provision is intended as a protection to home creditors and persons dealing with such foreign corporation seems clear; that it should be construed to prevent the building up of industries by foreign capital and to permit the confiscation of such capital at the instance of any of its own citizens seems to be not only quite aside from its purpose, but in contravention of the 14th Amendment of the United States Constitution. But this decision goes even further, and holds that "whatever was done by Nunn in the appropriation of water was done for the use and benefit of the defendant company and he cannot be treated as a personal claimant." Mr. Holbrook in his testimony (page 428) stated that he was a trustee for Mr. Nunn. The agreement between Sterling and Nunn and the deed of Ferguson to Nunn (pp. 609-610) show that he was a personal claimant. In his own testimony Mr. Nunn states that he claimed the right to raise the water to the 60-foot level for the purpose of putting it in the ditch, and twenty-five feet above that for reservoir purposes (page 309). He had expended on the enterprise over $50,000 before the commencement of this suit, and $200,000 before the time of the trial, all with the view to the construction of a large dam at Hanging Rock and an electric plant capable of developing 10,000 horse-power. The Supreme Court of Utah, apparently conscious of the monstrosity of its decision upon the point in question, makes this concession: "If Nunn had any right, it was with reference to the smaller power located below. The dam at Hanging Rock was to be a larger power, and was talked about in the project, but it was not constructed, and the ownership, if in any one, was in the defendant company, which was incapable of acquiring such ownership."

The same argument which would take away from Mr. Nunn the larger power would take away the smaller. But more than that, by the same course of reasoning, even if the railroad company or any other resident of Utah should by violence take possession of the smaller plant, neither of the defendants could be heard to assert their rights in any state court in Utah, the company because it had not complied with the law relating to foreign corporations and Mr. Nunn because he was the general manager of the company. That such a ruling is in violation of the supreme law of the land seems too clear to require argument. Certain statutes of Colorado are cited by the plaintiff (p. 627), and in the opinion of the Utah supreme court; but it may be remarked that they contain nothing, nor is there anything in the law of Utah or of Colorado, which would prevent The Telluride Power Transmission Company from extending the field of its operations to Utah by an amendment to its charter and then complying with the Utah law relating to foreign corporations. Nor is there anything in the law of Utah to prevent the stockholders of The Telluride Power Transmission Company from organizing a domestic corporation. In either case the rights acquired by Mr. Nunn as a personal claimant could be conveyed to the corporation. If in such case Mr. Nunn were acting as trustee for the persons who furnished the money to build up the enterprise, he could perform his trust by making a conveyance to them as individuals if they were acting as individuals or to a corporation if they were acting in a corporate capacity. But suppose they were a foreign corporation in Utah and had not complied with the Utah laws, could they compel Mr. Nunn under this decision to perform his trust? Surely a more unjust, irrational decision was never rendered.

S. A. BAILEY,
For Plaintiffs in Error.

ARTHUR BROWN,
H. P. HENDERSON,
Of Counsel.

APPENDIX.

Copy of Sections of Utah Statutes herein referred to.

No. 1.

Compiled Laws of Utah, 1888, sections 3841 to 3860.

TITLE VII.

OF EMINENT DOMAIN.

§3841. Subject to the provisions of this Chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. Public building and grounds for the use of Territory, and all other public uses authorized by the legislature.

2. Public buildings and grounds for the use of any county, incorporated city, village, town or school district, reservoir, canals, aqueducts, flumes, ditches or pipes for conducting water for the use of the inhabitants of any county, incorporated city, village or town; or for draining any county, incorporated city, village or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city, village or town, or the inhabitants thereof.

3. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads, steam and horse railroads, reservoirs, canals, ditches, flumes, aqueducts, and pipes for public transportation, sup-

plying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

4. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines.

5. By-roads leading from highways to residences and farms.

6. Telegraph lines.

7. Sewerage of any incorporated city.

§3842. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.

2. An easement, when taken for any other use.

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

§3843. The private property which may be taken under this chapter includes:

1. All real property belonging to any person.

2. Lands belonging to this Territory, or to any county, incorporated city, village or town, not appropriated to some public use.

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that which it has been already appropriated.

4. Franchises for toll-roads, toll-bridges and ferries, and all other franchises; but such franchise shall not be taken unless for free highways, railroads, or other more necessary public use.

5. All rights of way for any and all purposes mentioned in section 1105, and any and all structures and improvements thereon, and the lands held and used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvements or structures thereon. They shall also be subject to a limited use in common with the owner thereof, when necessary; but such use of crossings, intersections and connections, shall be made in manner most compatible with the greatest public benefit and least private injury.

6. All classes of private property not enumerated, may be taken for public use, when such taking is authorized by law.

§3844. Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.

2. That the taking is necessary to such use.

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

§3845. In all cases where land is required for public use, the Territory or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of this Chapter. The Territory or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the

owners of the lands, except for injuries resulting from negnegligence, or malice.

§3846. All proceedings under this Chapter must be brought in the district court for the district in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon.

§3847. The complaint must contain:

1. The name of the corporation, associations, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff.

4. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.

5. A description of each piece of land sought to be taken,and whether the same includes the whole or only part of an entire parcel or tract. All parcels lying in the same judicial district and required for the same public use, may be included in the same or separate proceedings at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties.

§3848. The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought, and a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions and must be served in like manner.

§3849. All persons in occupation of,or having or claiming any interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

§3950. The court or judge thereof shall have power:

1. To determine the conditions specified in Section 1108 and regulate and determine the place and manner of making connections and crossings or of enjoying the common use mentioned in the fifth subdivision of Section 1107.

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor.

3. To determine the respective rights of different parties seeking condemation of the same property.

§3851. The court, jury,or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a large parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff.

3. Separately how much the portion not sought to be condemned, and each estate or interest therein will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal

to the damages assessed, under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value.

4. If the property sought to be condemned be for a railroad the cost of good and sufficient fences along the line of such railroad between such railroad, and the other adjoining lands of the defendant.

6. As far as practicable, compensation must be assessed for each source of damages separately.

§3852. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the last section. No improvements put upon the property subsequent to the date of the service of summons, shall be included in the assessment of compensation or damage.

§3853. If title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same as in this chapter prescribed.

§3854. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed in respect to the land taken and also execute to the defendant a bond, which sureties to be approved by the court, or judge thereof in double the assessed costs of constructing good and sufficient fences as provided in subdivision 4, of section 1115, conditioned that the plaintiff shall build such fence within twelve months from the time the railroad is built on or over

the land taken, and the defendant or his grantees, in case of a breach of the conditions of said bond, may have an action thereon, and recover all damages sustained and the cost of constructing such fences, and when collected such damages and costs shall be paid into court, and that portion consisting of the estimated cost of fencing must be applied to that purpose under the direction of the court.

§3855. Payment may be made to the defendants entitle thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant if possession has been taken by the plaintiff.

§3856. When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned and the purpose of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purpose therein specified.

§3857. At any time after trial and judgment entered, or pending an appeal from the judgment to the supreme court, whenever the plaintiff shall have paid into court for the defendant, the full amount of the judgment and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceedings, as well as all damages that may be sustained by the defendant if for any cause the property shall not be finally taken for public use, the district court in which the proceeding was tried may, upon notice of not less

than ten days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The defendant, who is entitled to the money paid into the court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into the court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him excepting his claim for greater compensation.

§3858. Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

§3859. Except as otherwise provided in this Chapter, the provisions of this Code relative to civil actions and new trials and appeal, are applicable to and constitute the rules of practice in the proceedings in this Chapter.

§3860. Nothing in this Code must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes.

No. 2.

Session Laws of 1892, pages 91 and 92.

Section 1. That Section 2788 of the Compiled Laws of 1888 be and the same is hereby amended so as to read as follows:

Section 2788. Any persons, company, or corporation shall have the right of way across and upon public, private and corporate lands, or other right of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water-gates, canals, ditches, flumes, tunnels or other means of securing, storing and conveying water for irrigation, or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not to unnecessarily impair the practical use of any other right of way, highway or public or private road nor to unnecessarily injure any public or private property.

Sec. 2. A new section to be numbered 2788a is enacted as follows:

Section 2788a. In case said lands cannot be obtained by the consent of the owner, or owners, thereof, or a price deemed exorbitant is asked therefor, so much of the same as may be necessary for the construction, maintenance and use of said reservoir, dam, water-gate, canal, ditch, flume, tunnel or other means of securing, storing and conveying water, may be appropriated as follows: The person or persons, company or corporation shall select one appraiser, and said owner or owners shall select one, and the two so selected shall select a third, all three appraisers to be disinterested resident land holders in the county in which said lands are situated.

Session Laws of Utah, 1896, pages 316 and 317.

Section 1. The cultivation and irrigation of the soil, the producting and reduction of ores, are of vital necessity to the people of Utah; are pursuits in which all are interested and from which all derive a benefit; and the use and application of the unappropriated waters of the natural streams and water courses of the State to the generation of electrical force or energy to be employed in industrial pursuits are of great public benefit and utility. So irrigation of land, mining, milling, smelting or other reduction of ores, and such use and application of such waters for the generation of electrical power to employed as aforesaid are hereby declared to be for the public use, and the right of eminent domain may be exercised in behalf thereof.

Sec. 2 Any person, company or corporation which may be prior to the commencement of the special proceedings in this act provided for, engaged in the irrigation of lands, or in mining, milling, smelting or other reduction of ores may acquire real estate or the right of way through the same, when necessary, or any right, title, interest, or estate or claim therein, which may be necessary, for the purposes of any such business and any association, company or corporation which may be prior to the commencement of the special proceedings of this act provided for, formed or organized for the purpose of using and apylying any of the unappropriated waters of any natural stream or water course in the State, to the generation of electrical force or energy, to be transmitted, sold, furnished and supplied to those who may desire to use such force or power or energy in any industrial pursuit, or for any useful or beneficial purpose, may acquire real estate or right of way through the same, when necessary, or any right, title, interest, or estate or claim therein, which may be necessary, for the purpose of any

such business, by means of the special proceedings prescribed by this act.

No. 3.

Compiled Laws of Utah of 1888, Section 3350.

§3350. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court subject to its power to order any such issue to be tried by a jury or to be referred to a referee, as provided in this Code.

No. 4.

Constitution of Utah, Article XII, Sections 6 and 9.

Sec. 6. **Privileges of Foreign Corporations.** No corporations organized outside of this State, shall be allowed to transact business within the State on conditions more favorable than those prescribed by law to similar corporations organized under the laws of this State.

Sec. 9. **Place of Business, Process Agent, etc.** No corporation shall do business in this State, without having one or more places of business, with an authorized agent or agents, upon whom process may be served; nor without first filing a certified copy of its articles of incorporation with the Secretary of State.

Compiled Laws of Utah, 1888, Section 2293.

§2293. All incorporations not organzied under the laws of Utah now doing business in this Territory, shall within sixty days after the passage of this act, and all other foreign corporations within sixty days after commencing business in this Territory, file with the Secretary of the Territory and with the probate judge of the county wherein their principal office in this Territory is situated, certified copies of their articles and certificate of incorporation and by-laws, and in case of alteration and amendment of said articles or by-laws thereafter, shall file certified copies of such alteration or amendment with each of said offices, within thirty days after their adoption. Such corporation shall also within sixty days after commencing business in this Territory, designate some person residing in the county in which its principal place of business in this Territory is situated, upon whom process may be served and shall file such designation with the probate judge of said county, and with the Secretary of the Territory, and a copy of such designation duly certified by either of said officers shall be evidence of such appointment and it shall be lawful to serve on such person so designated any process issued as aforesaid, and such service shall be deemed to be valid service thereof. Any such corporation failing to comply with the provisions of this section, shall not be entitled to the benefits of the laws of this Territory, limiting the time for the commencement of civil actions.

Session Laws of Utah of 1896, pages 308-309.

Sec. 2293. All corporations, not organized under the laws of this State, before doing business within the State shall with file the Secretary of State and with the county clerk of the county wherein their principal office in the State is

situated, a certified copy of their articles of agreement, certificate of incorporation and by-laws, and, in case of alteration or amendment of said articles of incorporation or by-laws, shall file certified copies of such alterations or amendments with each of said officers, and shall also, before doing business within the State, by resolution of their board of directors, accept the provisions of the Constitution of this State, and also designate some person residing in the county in which its principal place of business in the State is situated, upon whom process issued by authority of or under the law of the State may be served. A copy of such resolutions shall be certified by the President and Secretary, under seal of the company, and filed in the office of the Secretary of State and in the office of the county clerk of the county in which its principal office is situated; any such corporation failing to comply with the provisions of this section, shall not be entitled to the benefits of the laws of the State relating to corporations: Provided, That all foreign corporations doing business within the State at the time of the approval of this act, shall have sixty days from the approval of this act to comply with the terms of this section; And, provided further, That the buying of bonds, notes or other commercial securities for an investment shall not be construed as doing business within the State.